

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

APPEAL FROM ORDER NO. 95 OF 2016
WITH
CIVIL APPLICATION NO. 16519/2016

Godavari Khore Cane Transport
Co. Pvt. Ltd.

Gautam nagar, Post Kolpewadi,
Ta. Kopergan, Dist. Ahmednagar,
Through its General Manager :

Sopan Baburao Dange,

Age : 58 years, Occu. : Service,

R/o.: Gautamnagar, Post Kolpewadi,

Dist. Ahmednagar.

... **APPELLANT**
(Ori. Plaintiff)

VERSUS

1. Sou. Vanitabai Chandrabhan Adhav,
Age : 58 years, Occu.: Household,
Work and Transport of Sugarcane.

2. Chandrabhan Sahadu Adhav,
Age : 64 years, Occu.: Agril.,

3. Hemant Chandrabhan Adhav,
Age : 44 years, Occu.: Agril.

R/o.: Kumbhari, Tal. Kopergaon,
District : Ahmednagar.

.... **RESPONDENTS.**
(Ori. Defendants)

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Advocate for Appellant : Shri. N.V. Gaware
Advocate for Respondent nos.1 to 3 : Shri. V. H. Dighe.

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CORAM : P. R. BORA, J.

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Reserved on : 11-07-2017.

Pronouncement on : 25/07/2017

JUDGMENT :

1) The legality of the order of remand passed by District Judge-2, Kopargaon in Regular Civil Appeal No. 59/2013 is challenged by the appellant by filing the present appeal. Appellants and respondents are hereinafter referred to by their status in the civil suit.

2) The plaintiff had filed Special Civil Suit No. 51/2005 in the Court of Civil Judge Senior Division at Kopargaon for recovery of an amount of Rs.7,35,683.91 on the basis of the account. As revealing is from the pleadings, the plaintiff company is carrying on the business of cutting the sugarcane and transporting the same to Kopargaon Cooperative Sugar Factory. For the said business, plaintiff hires the trucks. The truck belonging to defendant no.1 was hired by the plaintiff company in the period between 2001 to 2005. An agreement in that regard was executed between the plaintiff and defendant no.1. The plaintiff had given certain amount to defendant no.1 by way of an advance. The road tax, the insurance premium and the other government fees pertaining to the truck owned by defendant no.1 and hired by the plaintiff were also paid by the plaintiff company. Defendant no.2 was looking after the transactions for and on behalf of defendant no.1. Defendant no.3 had stood guarantor for the repayment of the advances made by the plaintiff to defendant no.1 and the expenses incurred by the plaintiff company on the truck hired of defendant no.1. Since a dispute arose and inspite of demand made by the plaintiff company, defendant failed to pay the due amount to the plaintiff, the plaintiff filed the aforesaid suit claiming the due amount according to his account jointly and severally from the defendants.

3) The defendants resisted the suit by filing their written statement. The suit was resisted on several grounds including the

maintainability of the suit and the limitation. The defendants denied the contention of the plaintiff as about the advances allegedly given by it as well as the expenses incurred by it on the hired truck. It was also alleged by the defendants that the agreements allegedly executed by them were sham and bogus. It was also alleged that the appellant company is doing the business of money lending without valid license.

4) On the basis of pleadings of the parties, the issues were framed by the Trial Court and thereafter the evidence was adduced by the parties. The learned Trial Court after having accessed the oral and documentary evidence brought on record before it, decreed the suit vide the judgment delivered on 21st March, 2013. Aggrieved by the judgment and decree so passed, the defendants preferred the Regular Civil Appeal No. 59/2013 in the Court of District Judge at Kopergaon. The learned District judge after having heard the learned counsel appearing for the parties, allowed the appeal and remanded the matter back to the Civil Judge with direction to frame the issues as were framed by the learned District Judge in his judgment and decide the suit afresh after affording opportunities to the respective parties within the period of six months. Aggrieved by the appellant has filed the present appeal.

5) Shri N. V. Gaware, the learned Counsel appearing for the appellant assailed the impugned judgment on various grounds. The learned Counsel submitted that the learned District Judge has patently erred in remanding the matter back for deciding it afresh by framing some new issues. Learned Counsel submitted that the issues which the learned District judge has framed were already covered by the issues framed by the learned Civil Judge in the Special Civil Suit and as such framing of such issues by the learned District Judge was wholly unwarranted. The learned Counsel submitted that it was never the case of defendants before the Trial Court that issues were not framed

properly or that some more issues were required to be framed. The Learned Counsel submitted that the learned Trial Court had appropriately framed all the necessary issues based on the pleadings of the parties. The learned Counsel further submitted that it was also not the case of the defendants before the Trial Court that they were deprived of any opportunity to defend the suit filed by the appellant in absence of not framing of any issue. Learned Counsel further submitted that the parties were fully aware of the controversy taking to the transactions between them, and as such it cannot be said that the defendants did not get due opportunity to defend because of non-framing of some necessary issues by the Trial Court. The learned Counsel in order to support his argument, relied upon the following judgments :

1) **2005 (1) Bom.C.R. 502 (Walha Ganpat Tadge since deceased by his legal heirs and others Vs. Ramchandra bala Sangale),**

2) **1987 DGLS (SC) 949 (Bhairab Chandra nandan Vs. Ranadhir Chandra Dutta),**

3) **1962 DGLS (SC) 152 (Nedunuri “kameswaramma” Vs. Sampati Subba Rao),**

4) **AIR 1982 Punjab and Haryana 182 (Vidya Dhar Vs. Onkar Nath) and**

5) **AIR 200 Supreme Court 426 (Ishwar Dass Jain (dead) through Lrs., Vs. Sohan lal (dead) by L.Rs.).**

6) The learned Counsel lastly submitted that on the basis of the existing material, the appellate court can very well decide the appeal and therefore, prayed for setting aside the order of remand passed by the appellate court.

7) Shri V. H. Dighe, learned Counsel appearing for the respondents supported the impugned judgment. The learned Counsel

submitted that the appellate court has rightly appreciated that the Trial Court has not framed the appropriate issues as about the real controversy between the parties which has resulted in depriving the respondents to put forth their contentions on the said issues. The learned Counsel, therefore, prayed for dismissal of the appeal.

8) After having heard the learned Counsel appearing for the parties and on perusal of the judgment delivered by the Trial Court in Special Civil Suit No. 51/2015 and the judgment delivered by the first appellate court in Regular Civil Appeal No. 59/2013, it apparently appears to me that the impugned order would not sustain.

9) I need not to reiterate the case of the plaintiff and the defences raised by the defendants since I have already noted the same in brief herein above. As has been observed by the Appellate Court in para 9 of its judgment, the controversy as is revealing from the pleadings of the parties is whether defendant no.1 executed any agreement in favour of the plaintiff company for the season 2000-2001 to 2004-2005 and whether defendant nos. 2 & 3 were sureties. The Appellate Court has further noted that the controversy is as to whether plaintiff paid any advance amount to defendant no.1 for truck repairing and on account of the expenditure on spare parts, diesel etc., amounting to Rs.6,04,082.91 in total and whether defendant nos. 1 to 3 agreed to repay the said amount with interest at the rate of Rs.18% p.a., and lastly whether the suit is within limitation. According to the discussion made by the learned Appellate Court, the learned Civil Judge has not framed any of the issues in regard to the real controversy between the parties. The Appellate Court had further observed that in absence of any such issue, it cannot be said that the Civil Judge has afforded due opportunity to the respective parties. It is further observed by the Appellate Court that when defendants are disputing the allegations made by the plaintiff that

defendant no.1 received the amount of Rs. Rs.6,04,082.91 from plaintiff company and agreed to make repayment of the same, the said issue ought to have been framed by the learned Civil Judge. After having made such observations, the learned Appellate Court has recorded a conclusion that the issues framed by the Civil Judge are totally vague in nature and he has not even decided real controversy in between the parties. The Appellate Court has thereafter framed the following issues and has directed the learned Civil Judge to frame the said issues and decide the suit afresh within a period of six months.

- 1) Does plaintiff prove that plaintiff has paid amount of Rs.6,04,082.91 ps for advance towards truck repairing, diesel expenditure, road tax, insurance etc., for the truck belonging to defendant No.1 ?
- 2) Does plaintiff prove that defendant No.1 executed an agreement from time to time for each season from 2000-2001 to 2004-2005 ?
- 3) Does plaintiff prove that defendant No.1 agreed to make repayment of the amount of advance with interest @18% p.a. thereon ?
- 4) Does plaintiff prove that defendant Nos. 2 and 3 executed surety bonds for performance of agreement executed by defendant No.1 ?
- 5) Does plaintiff prove that suit is within limitation ?
- 6) Whether plaintiff is entitled to recover suit amount from defendant Nos. 1 to 3 ?
- 7) What order and decree ?

10) In view of the observations made by the Appellate court note above, I deem it appropriate to reproduce herein below the issues framed by the Trial Court in the Special Civil Suit which are thus :

1. Does the plaintiff prove that Rs.6,04,082.91 is due and recoverable from the defendant Nos. 1 to 3 jointly and severally as the amount of advance payment and credit bill ?
2. Does the plaintiff further prove that Rs.1,31,301/- is due and recoverable from defendant Nos. 1 to 3 jointly and severally as the amount of interest for

the period of since 15.12.2004 to 31.07.2005?

3. Does the plaintiff further prove that Rs.300/- is due and recoverable from the defendants as the amount of notice charges ?
4. Whether the suit is within the prescribed period of limitation ?
5. Whether the plaintiff is entitled to recover Rs.7,35,683.91 Ps from the defendant Nos.1 to 3 jointly and severally ?
- 5A Does defendants prove that the plaintiff is doing the business of money lending without valid license ?
- 5B Whether the suit is maintainable ?
- 6 What order and decree ?

11) It cannot be disputed that the initial burden was on the plaintiff to prove that amount as was claimed by it from the defendants was due and recoverable from them. As has been observed by the learned Civil Judge in his judgment, it was the specific case of the plaintiff that it has hired the truck belonging to defendant no.1 for the crushing season 2000-2001 to 2004-2005 and defendant no.1 had entered into an agreement with the plaintiff in that regard. It was also contended in the suit plaint that defendant no.1 had executed an authority letter in favour of defendant no.2 for the purpose of the subject transaction. It was further specifically contended that on authority given by defendant no.1 in his favour, defendant no.2 had time to time taken advances from the plaintiff. It was also specifically pleaded that the plaintiff company had time to time incurred expenses on diesel, spare parts, tire etc., for the truck hired by it belonging to defendant no.1. It was also the specific case of the plaintiff that for repayment of the advances paid by the plaintiff company to defendant nos. 1 & 2 and expenses incurred by the plaintiff company on diesel, spare parts, tyres etc., on the truck belonging to defendant no.1, defendant no.3 had stood guarantor if the respondent nos. 1 & 2 fail to repay the same to the plaintiff company.

12) As is revealing from the discussion made by the learned Trial Court as also by the learned Appellate Court, the defendants have denied in toto the claim raised by the plaintiff. In para 5 of the judgment, the Trial Court has reproduced the defences raised by the defendants in the written statement filed by them in the suit. The defendants had contended that the plaintiff's suit is totally false, baseless and was not within the limitation. It was also contended by the defendants that the plaintiff company is doing the business of money lending without valid license. It was also pleaded by the defendants that there was no such agreement as claimed by the plaintiff between them and the plaintiff. It was also specifically denied by the defendants that no such advances as mentioned in the suit plaint were ever taken by them. It was also the contention of the defendants that bills, vouchers, insurance of the truck, government taxes were not paid by the plaintiff company. A specific defence was also raised by the defendants that the agreements executed by the defendants with the plaintiff company were bogus and imaginary. It was also denied that any guarantee deed as alleged by the plaintiff was ever executed by the defendant no.3 in favour of plaintiff company.

13) If the pleadings in the suit plaint and the defences raised in the written statement are considered, there remains no doubt that both the parties were fully aware of the controversy arose in between them. Merely because no specific issue has been framed by the learned Civil Judge whether plaintiff has paid the amount of Rs.6,04,082.91 for advance towards truck repairing, diesel expenditure, road tax, insurance etc., for the truck belonging to defendant no.1, it does not appear to me that any prejudice was caused to the defendants and in no case it can be accepted that since Trial Court did not frame the aforesaid issue, the defendants were deprived of an opportunity to defend the suit filed against them by the plaintiff.

- 14) The issue framed by the Trial Court is :
“Does the plaintiff prove that Rs.6,04,082.91 paise is due and recoverable from defendant Nos. 1 to 3 jointly and severally as the amount of advance payment and credit bill ?”

As per the aforesaid issue the entire burden was on the plaintiff to prove that an amount of Rs.6,04,082.91 was due and recoverable from defendant nos. 1 to 3 towards the amount of advance payment and credit bill. As noted earlier, all necessary particulars are provided in the suit plaint and defendants have denied the same. It is quite evident that to discharge the burden cast on it vide issue no.1, the plaintiff was bound to sufficiently prove firstly the agreements allegedly executed by defendant no.1 in it's favour, the advances given by it to the defendants and the expenses incurred by it towards truck repairs, diesel expenditure, road tax, insurance etc., pertaining to the truck belonging to defendant no.1. The further burden was also on the plaintiff to prove joint and several responsibility of the defendant Nos. 1 to 3 to pay the amount as was claimed by it in the suit. To prove the said fact and to substantiate the contention raised in that regard, it need not to be stated that the plaintiff was bound to prove that the defendant Nos. 2 & 3 had executed a surety bond for purpose of agreement executed by defendant No.1 in its favour, otherwise the plaintiff could not have proved the joint and several liability of defendant Nos. 1 to 3.

- 15) In the above circumstances, it cannot be accepted that the issue as was framed by the learned Civil Judge was vague or improper, and has resulted in depriving the defendants to properly defend the claim against them. The issue as has been framed by the learned Civil Judge covers everything which has been suggested in the issues framed by the Appellate Court. The same is about issue no. 2 as has been suggested to be framed by the Appellate Court. From the pleadings in

the suit, it is discernible that the entire claim of the plaintiff was based on the agreement executed by defendant no.1 in favour of the plaintiff and unless the said fact is proved, the plaintiff could not have proved that the amount of Rs.6,04,082.91 was due and recoverable from the defendant nos. 1 to 3. The said issue no.2 is also, therefore, squarely covered vide the issue no.1 framed by the Trial Court. Similarly, issue No.4 as was suggested to be framed by the Appellate Court was also covered by issue Nos. 1 & 5 framed by the Trial Court. Issue No.3 as suggested by the Appellate Court is covered by issue no.2 as was framed by the Trial Court. The Trial Court has framed issued No. 4, “ Whether the suit is within the prescribed period of limitation ?” Whereas the First Appellate Court has suggested issue No.5 as “ Does plaintiff prove that suit is within limitation ?” Thus, there is difference only in wording of the issues framed by both the courts. Issue No. 6 as suggested by the Appellate Court is more perfectly framed by the Trial Court as issue No.5.

16) After having considered the entire material on record, it is transpired that the defendants were fully aware of the claim raised against them by the plaintiff. As noted earlier, the defenses taken by the defendants in their written statement clearly demonstrate that they had fully understood the allegations made against them and the claim raised against them by the plaintiff. It is also a matter of record that the plaintiff in order to prove his claim has examined as many as 17 witnesses. In rebuttal, the defendants have also filed several documents on record. Defendants have also adduced the oral evidence of defendant no.2 Chandrabhan Adhav. It is, thus, evident that even if it is accepted that the issues as were framed by the Trial Court were not containing the necessary particulars as are pointed out by the Appellate Court, the parties have adduced the evidence on all the facts respectively pleaded by them and the Trial Court has decided the matter on basis of

the said evidence. Though the trial court might not have framed the issues as are suggested by the Appellate Court, the material on record clearly reveals that the parties have adduced the evidence on those issues and court have also decided all those issues as if there were issues framed in that regard. In such circumstances, the decision of the Trial Court could not have been set aside in appeal merely on the ground that no particular issue was framed. Law is well settled that mere omission to frame an issue is not fatal to the trial of the suit.

17) As has been held by the Hon'ble Apex Court in the case of **Nedunuri "kameswaramma" Vs. Sampati Subba Rao, reported in AIR 1963, (SC) 884**, if the parties had led the evidence on all the contentions raised by them, the dismissal of the suit or setting aside the judgment and decree passed in the said suit is not permissible on the narrow ground a particular issue was not framed before the Trial Court. The Hon'ble Apex Court in the said matter has further observed that though in the matter before it certain issue was not framed, and the one, which was framed, could have been more elaborate; but since the parties went to trial fully knowing the rival case and led all the evidence not only in support of their contentions but in refutation of those of the other side, it cannot be said that the absence of an issue was fatal to the case, or that there was mistrial which vitiates proceedings.

18) In the instant matter also some issues could have been more elaborate, however, as noted by me herein above the defendants went to trial fully knowing the rival case. In such circumstances as has been held by the Hon'ble Apex Court in aforesaid case it was not permissible for Appellate Court to set aside the judgment and decree of the Trial Court on the ground that issues framed were vague or some issues were omitted.

19) Moreover, as has been observed by this court in the case of **Walha Ganpat Tadge Vs. Ramchandra Bala Sangale, 2005(1) Bom. C.R. 501**, when the issues were framed by the Trial Court, it was always open for the defendants to request the court under Order-XIV Rule 5 of CPC to frame additional issues. Admittedly such an application was not made by the defendants at any point of time.

20) In view of the facts as above, it appears to me that Appellate Court has erred in passing an order of remand on the ground that certain issues were not framed by the Trial Court with necessary particulars.

21) It is a cardinal principle of remand that whenever it is noticed that something which is vital has not been decided by the Trial Court and the same cannot be decided by the Appellate Court because of proper materials on record, then only remand can be made. Such is not the position in the instant matter.

22) An order of remand can be passed only in exceptional cases where there had been no real trial of dispute and no complete or effectual determination of the proceeding and an aggrieved party is complaining that it had suffered material prejudice on that score. Such is also not the case in the present matter. I have elaborately discussed herein above that the defendants were fully aware of the claim raised against them and the plaintiff had adduced all necessary evidence in support of his claim. Not only that the plaintiff alone adduced the evidence, defendants also have placed on record voluminous documents and have also adduced the oral evidence. It, therefore, cannot be said that the defendants have suffered any material prejudice because non-framing of any issue or framing of issue with some less particulars. It appears to me that from the available material on record the Appellate

Court can very well record its own findings.

23) For the reasons stated above, the order of remand cannot be sustained. In the result, the following order.

ORDER

- 1) The order dated 07.11.2016 passed in Regular Civil Appeal No.59/2013 is set aside.
- 2) The Appellate Court shall decide the appeal on its own merits in accordance with law on the basis of evidence available on record.
- 3) Appeal stands allowed in the aforesaid terms. No order as to costs.
- 4) Pending Civil Application, if any, stands disposed of.

(P. R. BORA)
JUDGE